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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/681,099	01/04/2001	Richard E. Vogel	70254-328	8152
20915	7590	02/08/2006		
MCGARRY BAIR PC 171 MONROE AVENUE, N.W. SUITE 600 GRAND RAPIDS, MI 49503			EXAMINER ELOSHWAY, NIKI MARINA	
			ART UNIT 3727	PAPER NUMBER

DATE MAILED: 02/08/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/681,099

Applicant(s)

VOGEL ET AL.

Examiner

Niki M. Eloshway

Art Unit

3727

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01 November 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-32,34-38 and 62-80 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 62-80 is/are allowed.
- 6) ☒ Claim(s) 1-17,19-30,32 and 34-38 is/are rejected.
- 7) ☒ Claim(s) 18 and 31 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Introduction*

1. In view of the Appeal Brief filed on November 1, 2004, PROSECUTION IS HEREBY REOPENED. New grounds of rejection are set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:



Nathan Newhouse, SPE 3727.

2. After a careful review of the previous Office Action and the arguments presented in the Appeal Brief filed November 1, 2004, it was determined that the following changes in the prior art rejections should be made:

(A) The rejection of claims 9-12, 26-29 and 34-37 over Marsters et al. in view of FR 1,437,341, only, has been withdrawn (and replaced by a rejection over Marsters et al. in view of FR 1,437,341 and Smith et al.)

Art Unit: 3727

(B) All rejections using the secondary reference of Schmiedeknecht (GB 20,625) are withdrawn,

(C) Claims 9-13, 26-29 and 34-37 have been included in the rejection over Marsters et al. in view of FR 1,437,341 and further in view of Smith et al.

(D) The rejection of claim 17 over Marsters et al. in view of FR 1,437,341 and Smith et al. and further in view of Fitzgerald, has been changed to Marsters et al. in view of FR 1,437,341 and further in view of Fitzgerald, and

(D) New grounds of rejection are applied to claims 1-4, 7, 8, 19-22, 24, 25 and 32.

*Claim Rejections - 35 USC § 102*

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 1-4, 7, 8, 19-22, 24, 25 and 32 are rejected under 35 U.S.C. 102(e) as being anticipated by Park (U.S. 6,216,856). Park teaches a cup assembly, shown in figure 3, for use with a cup 30, having a collar 12 and a sleeve 40, 50. The sleeve comprises a body 40 and bottom wall 50. The bottom wall 50 has a central opening, shown in figure 3, which is considered to be the “at least one air passage” set forth in claims 4 and 22.

Regarding claim 19, the claimed assembly comprises a collar and sleeve (not the cup). An appropriately sized cup would abut a portion of the bottom wall 50, when inserted into the sleeve, to the degree set forth in claim 19.

*Claim Rejections - 35 USC § 103*

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-8, 19-25, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marsters et al. in view of FR 1,437,341. Marsters et al. does not teach the collar. FR 1,437,341, as seen in the Figs 1 and 2, teaches a collar for a cup. It would have been obvious to employ the collar of FR 1,437,341 in the cup of Marsters et al. so that the cup could be used by infants. The collar will cause the cup to be retained between the collar and the sleeve.

Regarding claims 8 and 25, see Fig.2 of FR 1,437,341 where the shoulder is shown to limit the insertion of the collar.

7. Claims 9-16, 26-30 and 34-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marsters et al in view of FR 1,437,341 as applied to claims 1, 19 and 32 above, and further in view of Smith et al. The modified container of Marsters et al. does not teach the protrusion on the insert portion of the collar. Smith et al. teaches a collar for inserting into a container with a protrusion on the insert portion. It would have been obvious to employ the rib of Smith et al. in the modified container of Marsters et al. to provide a liquid tight seal as disclosed by Smith et al.

Regarding claims 15 and 16, the protrusion is considered an annular rib and an embossment.

8. Claims 9 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marsters et al. in view of FR 1,437,341 as applied to claim 1 above, and further in view of Fitzgerald et al. The modified container of Marsters et al. does not teach the longitudinal rib on the inner surface of the sleeve (the insert portion on the collar). Fitzgerald et al teaches a holder or sleeve with ribs on the inner surface for holding

Art Unit: 3727

the inner container. It would have been obvious to employ the ribs of Fitzgerald et al in the modified container of Marsters et al. to better retain the cup in the sleeve.

*Allowable Subject Matter*

9. Claims 8 and 31 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

10. Claims 62-80 are allowed.

*Response to Arguments*

11. Applicant's arguments filed November 1, 2004, regarding the maintained rejections have been fully considered but they are not persuasive.

Applicant argues that Marsters et al. and FR 1,437,341 are non-analogous art. It has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, both Marsters and FR 1,437,341 are in the field of applicant's endeavor because they, like appellant's invention, concern cup attachments. Cup holders and cup attachments are in the field of applicant's invention.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958

Art Unit: 3727

F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the teaching to attach a drink-through lid to a cup, is found in the secondary reference, FR 1,437,341. Attaching a drink-through lid to a cup enables a toddler or infant to drink from the cup. This is the motivation used to modify the Marsters cup by adding the drink-through lid. The secondary reference teaches that the drink-through lid enables a toddler or infant to drink from the cup and this motivation is also within the knowledge generally available to one of ordinary skill in the art.

The Marsters et al. patent teaches a sleeve, to the degree set forth in the claim, which receives a cup. The collar is taught by FR 1,437,341. The drink-through lid of FR 1,437,341 can be considered a collar to the degree set forth in the claim because it has a substantially cylindrical portion and is located at the open to end of the cup. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., "the claimed collar requires that a mixer or the like be received therethrough" second paragraph on page 13 of the Appeal Brief filed 11/1/04) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

The issues argued for claims 19 and 32, have been addressed above.

Applicant argues that the reference of Smith et al. is non-analogous art. The examiner disagrees with this position. Smith et al. relates to attachments for cups. Marsters et al., FR 1,437,341 and the

Art Unit: 3727

present invention also concern cup attachments, such as cup holders and mouth extensions. The Smith et al. reference teaches how to attach a mouth extension to an opening and provide a good seal therebetween. This is the teaching used to modify the modified cup of Marsters et al.

Applicant argues that the reference of Fitzgerald et al. is non-analogous art. The examiner disagrees with this position because it is directed to a container holder which is a sleeve attachment, similar to the sleeve attachments of Marsters et al. and the present invention.

The motivation to provide the modified sleeve of Marsters et al. with ribs, as taught by Fitzgerald, is found in the Fitzgerald reference. Specifically, Fitzgerald teaches that the ribs facilitate passage of the container on insertion into the sleeve (col. 2 lines 21-23) and assist in keeping the container snugly held in the sleeve (col. 2 lines 26-27).

#### *Conclusion*

12. THIS ACTION IS NON-FINAL.

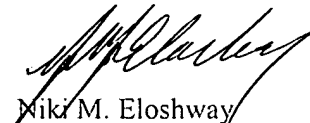
13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Niki M. Eloshway whose telephone number is 571-272-4538. The examiner can normally be reached on Thursdays and Fridays 8 a.m. to 4 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan Newhouse can be reached on 571-272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



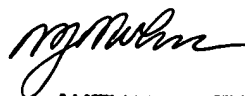
Art Unit: 3727

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Niki M. Eloshway  
Examiner  
Art Unit 3727

nme



**NATHAN J. NEWHOUSE**  
**SUPERVISORY PATENT EXAMINER**